


OHIO STATE
UNIVERSITY

ADDRESS OF 

DR. F. B. McNEAL,

AGAINST THE PREAMBLES AND RESOLUTIONS

OFFERED BY THE

SPRINGFIELD BOARD OF TRADE,

AT THE MEETING OF THE

THE STATE BOARD OF COMMERCE,

NOVEMBER 18, 1895.

AT THE

BOARD OF TRADE AUDITORIUM,

COLUMBUS, OHIO.



STATE OF OHIO
H.P. 9000,9
TREASURER

At the meeting of the Ohio State Board of Commerce at the Board of Trade auditorium, Columbus, Ohio, Nov. 18, 1895, Springfield Board of Trade offered the following preambles and resolutions.

WHEREAS, The necessity for a stringent food law for the protection of the public from imposition by the manufacture and sale of adulterated and impure food, drink and drugs, is apparent to every one; and,

WHEREAS, A law enacted in any State which makes the dealer in any of these articles, who unwittingly or through the misrepresentation of the manufacturer sells an article that does not comply with the letter of the law, guilty of a crime and subjects him to arrest and fine or imprisonment or both, when the facts as to the violation are practically beyond his reach, is not in keeping with the constitutional rights which are guaranteed to every citizen in the United States; and,

WHEREAS, Such a law is now in the statute books of the State of Ohio, and its literal interpretation and enforcement is causing much annoyance, expense and injustice to many innocent dealers in the articles above mentioned in various parts of our State; and,

WHEREAS, The repeal of said law, without giving the citizens of our State protection in some way, would be disastrous to the welfare of our people; therefore, be it

Resolved, That the officers of The Ohio State Board of Commerce be and they are hereby requested to prepare a bill to be presented at the next session of Congress, governing the manufacture, importation and sale of food, drink, and drug products in the United States, which will impose severe penalties on manufacturers of impure and adulterated goods in this country, and on dealers who knowingly sell or offer for sale such adulterated products; and which will provide for the careful and strict inspection of all food products imported from foreign countries; and be it

Resolved, That the officers of this organization be and they are hereby requested to petition the General Assembly of Ohio, that (until such time as national legislation governing the manufacture and sale of food products can be secured) the laws now on the statute books on this subject be so amended and modified that persons arrested for their violation shall have the right to make the same defense as in other criminal cases.

ADDRESS OF

Dr. F. B. McNeal,

AGAINST

THE ABOVE PREAMBLES AND RESOLUTIONS.



MR. PRESIDENT, AND GENTLEMEN OF THE OHIO STATE BOARD OF COMMERCE:

I want to thank you for the courtesy extended to me this day of being invited to attend your annual meeting. I want also to express most heartily my thanks for the privilege of being heard upon the matters set fourth in the preambles and resolutions which are now before you. These resolutions are prefaced by a series of preambles, the first and fourth of which I heartily endorse, and, I believe there will be no attempt to controvert them in any respect by any class of citizens.

The first recites that the necessity for a stringent food law for the protection of the public from imposition by the manufacture and sale of adulterated and impure foods, drinks, and drugs, is apparent to every one; the fourth, that the repeal of said law (meaning the Ohio Law) without giving the citizens of our State protection, would be disastrous to the welfare of our people.

The first sets out not only the necessity for a stringent pure food law, but recites what class of our people are to be protected by it, - the public. This means the vast army of consumers of foods, drinks, and drugs, in our State. These are the parties to be protected by regulations of this kind, because the circumstances which surround them render them absolutely powerless to protect themselves. It is obvious, then, that if this protection is to come from the State, it must come under the the provisions of a mandatory and prohibitory law. Its mandates should be - first, to designate what shall constitute the adulteration of foods, drinks and drugs, also to direct what shall be done to determine the character of the goods sold, and how the parties responsible for their sale shall answer for their violations to the law.

The law in our State defining what shall constitute an adulterated article of food, drink or drug, is clear and comprehensive, and with little variation is the definition which is now applied to laws in every State in our Union that has adopted any such means for the protection of its citizens. In its provisions it is made to comprehend two principles, to accomplish two principal results.

First to prevent fraud upon the people of the State: Secondly, to promote and protect the health of our citizens. In making provision as to how and by whom these provisions are to be enforced, our law directs the election of a Dairy and Food Commissioner, who shall have power to appoint assistants and other employs, with general authority for the execution of the law. I here particularly desire to call attention to the fact that in this mandatory provision the officers are made executive in their character entirely, with no provision whatever for judicial authority or legal construction of the statutes which they are called to execute.

Our statute declares that these officers shall inspect the goods that are on sale in the State, and where they have reason to believe that goods are adulterated or unlawful, they shall buy samples, have them analyzed, and where violations of the law are found, they shall prosecute the violators.

The second, or prohibitory character of our statutes, is as plain and sweeping. Whoever manufactures for sale, sells, or has in his possession with intention to sell any of the articles found to be adulterated, shall be fined not less than a minimum figure or more than a maximum figure, or imprisoned not less nor more than so many days. One or both at the discretion of the Court.

This brings up the consideration of the second and third preamble offered for your consideration. The one, though not entirely clear in its statement, attempts to assert that holding a dealer in adulterated products responsible for the character of the goods he sells, without proving his knowledge of fact, or his intention in selling such goods, is not in keeping with the constitutional rights which are guaranteed to every citizen in the United States. The other asserts that in the enforcement of the law now upon our statute books unnecessary annoyance, expense and injustice is being done to what are termed "innocent dealers," in this class of products. Coming squarely to the proposition of knowledge of fact, I here assert that the laws upon the statute books of every State of the Union having provision for the regulation of these matters are based upon the one simple proposition, that whoever sells to me a food product or any article to be taken into my stomach should be required to deliver to me exactly what he sells, and that every court of last resort that has passed upon this particular proposition has held such statute and such construction of law to be constitutional.

In every State of the Union where this question of knowledge, in food adulteration cases, has been brought before the Supreme Courts of the States, the decisions have been universally in the line of holding the dealer absolutely responsible for the goods he sells without any regard to whether he knows them to be adulterated or not, and I assert here, that no law will ever be enacted that will efficiently prohibit the sale of such goods that does not prohibit the sale regardless of knowledge of fact.

In our State courts no one now claims knowledge of fact as necessary to be proven by the State. The want of such knowledge, as a defense, has been passed upon by our circuit court, and is now pending before the Supreme Court. That it has not been determined before this, is not the fault of the court nor of the dairy and food department, but is entirely owing to the dilatory practices of those who have charge of the defence.

This question was passed upon in the case of David Meyer vs. the State of Ohio, in error to the Court of Common Pleas, Summit County, where it was held that such want of knowledge was not a legitimate defence; the same case being carried to the circuit court of the eighth circuit of Ohio, Judge Hale, delivering the opinion in affirming the decision of the lower court, has this to say:

"We are now to consider whether it is competent for the accused to prove in his defence a want of knowledge. It may be fairly inferred that the legislature of the State intended by this positive enactment to prohibit absolutely the sale of adulterated wine, and that knowledge by the accused of its adulteration is not an essential element of the crime. It must be conceded that the object and purpose of this statute, if not wholly subverted, would be weakened to the extent that it would in no wise accomplish the result intended by its enactment, if the accused go acquit by simply showing he did not know the nature of the article sold."

You will notice that the learned Judge not only confirms the law, but states that any law or construction of law that did not hold this principle would absolutely subvert the results intended by the enactment, that is, the protection of the people. The Judge further says in the same case:

"We see no injustice in holding the seller of food products responsible for what he sells, and in casting upon him the burden of knowing whether the foods sold do or do not fall within the prohibition of the statute. With that care and honesty which is incumbent on the seller of such products, he is in no danger of suffering wrongfully or unjustly from the enforcement of the rule adopted by the trial court in this case, the enforcement of that rule seems to be an absolute necessity to protect the public from fraud and imposition."

In order to protect the public against these evils, it is necessary to determine the exact condition of food products as they are delivered to consumers. This necessitates the inspection of goods in the hands of retailers or to secure samples as near as possible in the exact condition that they are to be received by the individuals constituting the great body of consumers throughout the State. Samples must, for this reason, be taken from the retailers and from no other source, and having thus been found to be adulterated, the party from whom they have been directly purchased must be held responsible for their condition, and if a single step is taken

from this position, the whole fabric of responsibility must fall to the ground. Back of the retail dealer every party through whose hands such goods have passed must be held responsible until we reach the party who has produced them. Thus a chain is formed, the extreme links of which are the retail dealer upon one hand and the manufacturer or producer upon the other. The retail dealer being the link to which we have attached our investigations, if his responsibility is dropped out, the entire chain is gone from our grasp.

Oh, says one, why not begin at the other end of the chain and hold the manufacturer responsible, so that no bad goods will be sent out from his establishment, and then none can be sold. In the first place, the great majority of products of this kind sold in the stores of our country are of such character and are sold under such conditions that they may be adulterated by any dealer through whose hands they may pass after leaving the manufacturer.

If the question of knowledge is to become a factor in the responsibility for this adulteration, where along the line can I fix responsibility or attach a penalty for the crime? And this, too, whether the goods have passed beyond the limits of State lines or not. This situation is perhaps illustrated as thoroughly in the single article of milk as in anything else. The producer of milk may be within the limits of Franklin county, the collector whose business it is to take such milk and deliver it to the milk depots within the city of Columbus, the milk depots which distribute it to the people throughout the city, all may be within the limits of the jurisdiction of a single Justice of the Peace or magistrate. Release the retail dealer from responsibility for the condition in which such milk passes from his hands to the consumer, and you can establish no system of inspection or inquiry that will develop responsibility for the condition of the article and place it upon any party through whose hands it has passed before him. The parties who desire to perpetrate such fraud and avoid responsibility for their acts will sit right in your court room and laugh at your efforts to prevent them.

Goods put up in sealed packages may be a little less liable to such adulteration, yet they can in no manner be made free from it. Even the character of goods that are put up in sealed packages and are of such manufacture as would render their being mixed or adulterated after passing from the hands of the manufacturer highly improbable or almost impossible, are easily placed in such situation that it is altogether impracticable or impossible to trace

them to their source of production. All that is necessary is to tear off or cover up the label of the manufacturer and place upon the package a label giving a fictitious source of the production of the goods; in fact, in this class of goods there is scarcely a leading manufacturer throughout the United States that has not his assumed or fictitious firm under whose name he puts out the goods whose source he does not desire to reveal. For instance, the firm of Jacob Weller & Company in Cincinnati, when putting out a lower grade of goods instead of labeling them as the product of the Jacob Weller Company have been in the habit of labeling them Queen City Packing Company. The Dayton Spice Mills Company when putting up an adulterated article of coffee saw fit to label it as the production of Sunrise Coffee Company; and so we might go on to illustrate in the production of almost every line of goods throughout the country. Oh, but says one, "if we had a National law requiring every man to label his goods with his own name and designating his own place of business, then we could regulate this matter". Suppose that the great firm of E. R. Durkee & Company of New York City should put out a line of goods and label them as the production of East India Spice Mills, New York; such goods are found in San Francisco upon sale, - how would you go to work in San Francisco to ascertain whether or not there was a partnership or corporation doing business in New York City under the name of East India Spice Mills Company? These illustrations might be carried on indefinitely, but I think enough has been said to show you that it is absolutely impossible to adopt any system of inspection or inquiry confined to the source of production of goods, that will cover their condition and quality when they have reached the hands of the consumer.

We come now to consider the last of the preambles here set out. That is, has an injustice been done to the dealer by holding him thus responsible for the character of the goods he sells. I am willing to admit that in many cases some inconvenience, no little expense, and in some cases, even hardship may be placed upon the dealer by reason of this rule. But if these things have come about at all it has been by reason of the wrong doing of the party from whom he has purchased his supplies, and not any wrong upon the part of the person to whom he sells, and if he is to look for redress or receive immunity from any source it should

be from the source from which the difficulty comes and not place it upon the innocent consumer who is in no wise responsible for the condition under which the dealer is placed, neither has he any power of authority to shift such burden. If I have been the victim of an imposition or a wrong from my neighbor, and I transmit and perpetrate that same wrong upon you, my redress should not be in making you the loser but should be back upon the man from whom the wrong has come to me. For instance; if I pass a counterfeit coin to any of you unwittingly and unknowingly, you ascertaining the character of such money, and knowing that you have received it from me rightfully require of me that I receive back that coin and return to you good honest money in the place of it. If I am unable to determine from what source I received such piece, I am bound to be the loser; so if the dealer in adulterated goods passes them to a consumer, he should be responsible for and make reparation to the State as the representative of the consumer, and if he is unable to trace said goods back to the source from which he obtained them and enforce redress, then he should be the loser.

Our laws should be amended and strengthened in such manner as to give dealers from the one to the other more thorough redress until such goods are traced to their source. Very much can be done in this direction by the cooperation of dealers with the parties who are charged with the enforcement of such laws. This is illustrated by the facts occurring in the work of our department within the city of Columbus during the past few months.

Articles have been found in the hands of retail dealers, which, upon examination proved to be adulterated, holding the dealer responsible, but exercising a proper discretion, giving a promise of immunity from prosecution to the dealer provided he should develop the source from which he purchased, and the date of purchase from the jobber; i. e., turning State's evidence. Jobbers being prosecuted in such cases who had purchased from manufacturers upon guarantee not only to indemnify against all loss by reason of fines, costs and fees, but also to indemnify against any damage to business, have led the producers of these goods to come here from nearly all the principal cities of the United States, substitute their names upon the dockets of magistrates for the names of our local jobbers, pleading guilty, paying the fines and costs, thus relieving the jobber even from the odium of going upon the records of mag-

istrates as being responsible for selling adulterated goods; and I now assert, and it is capable of demonstration that out of more than four hundred and fifty cases prosecuted by the Ohio Dairy and Food Commissioner since the fifteenth of February last, based upon articles found to be adulterated, the greater portion of them have been by this means traced to the producers of the goods, and more than three-fourths of the twelve thousand dollars paid as penalties for such violations, have been paid by the manufacturers of the goods, and have been drawn from all of the principal cities of the United States, - from Boston to San Francisco, and from Detroit to New Orleans; and I believe now that of the individuals who are instrumental in bringing this matter before your Board to-day, who have been prosecuted by our commission, not one dollar of fines has been actually drawn from their pockets but has come from the sources to which I have referred. Such a result can never be brought about by any law, State or National, that undertakes to relieve from responsibility upon the grounds of ignorance of fact.

We come now to the consideration of the resolution requesting this Board to formulate a National Law, and the provisions of such law as set out in the resolution.

It would seem a little strange that grocers who are directly interested in this matter should request of an Association, such as yours, composed of all classes of business men, to formulate a law for their particular benefit, and this request is doubly strange when it is known that the editors of the official paper of the retail grocers' association of Cincinnati, and also the leading merchant paper for all the grocers of the State of Ohio, have been diligently engaged for twelve months past in trying to formulate a bill of this kind, and have had in their employ one of the leading attorneys of Cincinnati, and a member of the last and present Congress, who for the past eight months, has been endeavoring to get over the legal difficulties in the way of formulating a bill of this kind. If these men in all this time have been unable to meet their requirements, do you suppose that these interested parties are sincere in coming to this body to-day asking you to formulate a bill and requesting the insertion of provisions in such bill, which they must be aware are impracticable and unconstitutional; all to be formulated and ready to present to the next session of Congress, which will convene three weeks from this time.

You are asked to incorporate in such bill a provision for im-

posing penalties upon manufacturers, and on dealers who knowingly sell adulterated articles. The carrying out of such resolution is impossible for two reasons. First, that the law incorporating such provision would be impossible of enforcement by United States authority throughout the country, secondly, that the United States has no constitutional authority for enacting such a law. I think I have shown above that even in the State or county a law incorporating the necessity of knowledge of fact as a requisite of the responsibility of the dealer would render it impossible to trace an adulterated article from the consumer to the producer and if impossible with a county or State, how could it be expected to be made effective when extended over the vast territory of the entire United States.

The United States Government in collecting Revenue upon distilled liquors requires the registration of every distillery holding goods in bond, licensing of every dealer, sealing and numbering, and recording of every package transferred from one dealer to another, until the consumer is reached. From this it will be seen how absolutely impossible it would be to place such supervision over the hundreds of thousands of food products as would prevent adulteration at their source of production or at any time after until they reach the consumer.

The last provision asked in this resolution is wisely worded, and shows that the parties who have presented this matter to you were aware of the legal aspect of the subject which they were presenting. They ask you to formulate a bill which shall provide for careful and strict inspection of all food products imported from foreign countries. Has it not occurred to you as strange that if the parties were sincere in this respect that they did not ask for inspection that should include articles produced in this country as well as those that came from abroad? They well know that no United States Pure Food Law would amount to anything in its mandatory or prohibitory provisions without thorough inspection and determination of the character of the manufacture and sale of prohibited goods.

Is it not nonsense then to talk about a United States Law that will impose severe penalties for its violation with no provision or authority for its enforcement? But it is needless to discuss this phase of the subject further, for the reason that recent decisions of the United States Supreme Court have plainly demonstrated

that all mandatory and prohibitory laws against subjects and productions which are within the police powers of the States are subject entirely to State laws, and are without the constitutional authority of the United States; that the establishing of standards and definition of what shall constitute the adulteration of foods, drinks, and drugs, is a police power for the preservation of health and protection to the people against fraud, is clearly established by the decision of the U. S. Supreme Court in the case of *Plumley vs. The Commonwealth of Massachusetts*, decided at the October term of said Court in 1894. I will now quote you from the certified copy of the decision of said Court in this case:

“If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which, it ought not to be supposed, was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. Such legislation, may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States. In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country.”

That the manufacture and sale of food products which are partially consumed in the State of their production, and partially a subject of commerce between the States or the United States and foreign countries, is not a subject coming within the constitutional jurisdiction of the United States, in their constitutional authority to regulate commerce is plainly set out in the case of the *United States, Appellant, vs. E. C. Knight Company, Spreckels Sugar Company, et. al.*, passed upon by the Supreme Court of the United States on January 21st, 1895, from a certified copy of which I quote:

“It cannot be denied that the power of the State to protect the lives, health and property of its citizens, and to preserve good order and the public morals, the power to govern men and things within the limits of its dominion is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and essentially exclusive.” * * * “On the other hand, the power of Congress to regulate commerce among the several States is also exclusive.” * * *

“It is vital that the independence of the commercial power and

of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government." * * * "The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce." * * *

"If it be held that the term includes the regulation of all such manufacturers as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry." * * * "The demands of such supervision would require not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent."

The petition to dissolve the sugar trust under the provisions of the Sherman anti-trust law, was therefore denied.

Thus it will be seen that the power of the States to regulate these matters is thoroughly and completely established, that the United States has not the authority to interfere is just as thoroughly and completely laid down. That the parties who have been most zealously investigating this subject and seeking a manner in which a United States law could be made effective, was plainly stated in an editorial of the Cincinnati Merchant Sentinel of November 11th, 1895. Speaking of their work in connection with Congressman Bromwell in this direction they have this to say:

"Coming, then, directly to the consideration of the constitutionality of the present law, allow us to state that while you cannot frame a mandatory prohibition and enact it as a law, Congress has delegated to it the right and power to form a regulation governing the commerce and traffic between the States under its interstate commerce functions, and along this line, will be framed and introduced a perfectly constitutional law, which will, IN THE END, do for the consumers all that a mandatory regulation could accomplish."

Thus it will be seen that these parties have entirely given up the idea of the enactment of a law that will restrain or prohibit the sale of adulterated foods, drinks, and drugs.

We come now to the consideration of the last resolution offered, which evidently holds the key to this whole transaction. Knowing full well that no such law could or would be enacted by the United States Congress as they have asked you to formulate, they have sought the amendment and emasculation of our State laws, "Until such time as the United States law should be enacted." Assuming that some different rule was applied to the prosecution of persons violating our pure food laws than that which applied to all other criminal prosecutions. Such a proposition is utterly defenceless and without foundation and fact. These offences are made by the law misdemeanors which are limited and inferior offences and do not partake of the elements of actual crime. They are what are termed in law *MALA PROHIBITA*, and are only offences because they are made such by statutory enactment. Their violation has been held to be lawful and just cause of punishment without reference to knowledge of fact ever since Greenleaf wrote his treatise on evidence, and the violator of this class of statutes has been held to the penalty attached without regard to knowledge or intention, in all the history of our country.

Go out at any time when the law prohibits the shooting of doves, shoot one down, and you will be responsible for the penalty, no matter how sincerely you thought it was a pigeon. The law governing the taking of fish allows the netting of suckers and mullets, but prohibits the taking of other fish in that way. It would be no defence for a violator of this statute to say that he honestly believed that he was taking the kind of fish that were permitted to be taken. The person marrying another who has been previously married and not divorced is guilty of adultery no matter how innocent such marriage is contracted or how honestly the person thought he was actually contracting a legal alliance. The engineer running a train out of time and causing the death of those entrusted to his care is guilty of murder though he may not have known that a wreck was to occur, much less have intended to injure anyone.

Time prevents the enumeration of other offences to which penalties are attached without reference to knowledge or guilty intent. But let us see if there is not another meaning to this resolution. The "Merchant Sentinal" of last Saturday says; "To our minds the only practical method of compiling a law of this kind is to consult the people who are to be regulated." We admit and so does he,

(Mr. Bromwell) the ones to be consulted are the makers and producers of the goods throughout the country which the law will try to govern. Let us go a step further and see if we cannot find what modifications and amendments to our law these people who are to be regulated desire. I have here two letters, one dated April 18th, the other dated May 14th, of this year. They are from the American Grocer Publishing Company, New York, speaking as the organ of the food industry of this country they solicit political influence to modify our laws and these are the lines of modification: "Regulation of our food supply should only prohibit the manufacture and sale of injurious substances. Arrests should only be made in cases of willful violation of the law. The best safeguard the public can have is supervision and publication, letting competition do the rest."

These, then, are the amendments to be asked of our State legislature, and may we not assume this is the kind of bill our Congressman and his editorial friends are incubating, which they refuse to give to the public, and pending the enactment of which you are asked to assist in wiping out our State laws,

State laws should be enacted more fully protecting dealers from imposition of those from whom they buy, but if an attempt to emasculate the laws we have is to be made; if dealers are to be relieved of responsibility; if fraud is to be unrestrained, and protection to our people is to be subject only to the sweet will of those who deal in such products, I shall do what I can to preserve our statutes as they stand

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